United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-1227

B
P/S

United States Court of Appeals

For the Second Circuit.

In the Matter of Honorable Lee P. Gagliardi, United States District Judge for the Southern District of New York,

Petitioner-Appellee,

Evelyn Williams, Esq.,

Respondent-Appellant,

U.S.A.,

Plaintiff,

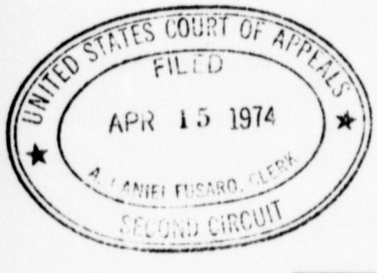
v.

JoAnne Chesimard, et. al., Defendants.

On Appeal From The United States District Court For The Southern District Of New York

---

APPELLANT'S BRIEF



Attorneys for Appellant, Evelyn Williams

William M. Kunstler
Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003

(Other Appearances on Inside)

Attorneys for Appellant, Evelyn Williams (Continued)

Hayward Burns
National Conference of Black Lawyers
126 West 119th Street
New York, N.Y. 10026

James Larson
Arthur Kinoy
National Lawyers Guild
23 Cornelia Street
New York, N.Y. 10014

O.T. Wells
National Bar Association
377 Broadway
New York, N.Y.

Evelyn A. Williams (Pro Se)
461 Central Park West
New York, N.Y. 10025

To be argued by:
Professor LeRoy Clark
New York University
40 Washington Square South
New York, N.Y.

TABLE OF CONTENTS

CASES CITED

DISTRICT JUDGE FOR THE SOUTHER
DISTRICT OF NEW YORK

- X

Evelyn Williams, Esq.

Respondent-Appellant

U.S.A.,

Plaintiff,

cv.

JOANNE CHESIMARD, et al

Defendants.

- X

APPELLANT'S BRIEF

ISSUES PRESENTED FOR REVIEW

1. Whether the specifications against the attorney-appellant must be dismissed under the facts of this case and the Fifth and Sixth Amendment rights of vigorous advocacy and effective counsel and because they do not charge conduct which constitutes misbehavior obstructive of the administration of justice?

2. Whether the specifications against the respondent must be dismissed under the facts of this case and because they do not charge conduct which constitutes misbehavior obstructive of the administration of justice.

3. Whether appellant was constitutionally entitled to notice of charges and a full hearing on her guilt or innocence of the crimes alleged where there was no need to proceed against her summarily?

4. Whether respondent-appellant was entitled to have the charges against her tried before another judge because the record demonstrates that the trial judge did not represent the impersonal authority of the law, but was "personally embroiled."

5. Whether appellant was denied her constitutional right to trial by jury in light of the seriousness of the charges against her?

STATEMENT OF THE CASE

This is an appeal from the judgment of conviction entered against Evelyn Williams, trial attorney for JoAnne Chesimard at the conclusion of the trial of the United States v. JoAnne Chesimard, et als., 73 Cr. 572 (S.D.N.Y.) for alleged violations of 18 U.S.C., Section 401 in accordance with Rule 42 (a) of the Federal Rules of Criminal Procedure.

The trial of the defendants began on December 3rd, 1973 and terminated on December 14th, 1973 in a mistrial when the jury failed to agree on a unanimous verdict. Following said mistrial, Judge Gagliardi, the trial judge, directed the respondent-appellant to appear before him at 9:30 on Tuesday, December 18th, 1973 for sentence on alleged contempt committed on the 5th day of December, 1973, during the jury selection process. (See transcript pg.SLSG-51; Pg. 51 of appendix). The contempt citation was served upon her in open court on the

18th day of December, 1973. On the 3rd day of January, 1974, she was sentenced to 10 days imprisonment, said judgment and commitment entered on the 5th day of February, 1974, together with a memorandum decision by the trial judge, Hon. Gagliardi.

On June 13th, 1973, the above-mentioned indictioned indictment charging the defendant, Chesimard, together with a co-defendant, with the crime of bank robbery was filed in the District Court for the Southern District of the State of New York. On August 1st, 1973, the defendant Chesimard was arraigned before the Southern District Court of New York, and returned to the State of New Jersey for the purpose of preparing for and completing the trial, which indictment consisted of Eight counts: Two for Murder, One for attempted murder and others of Assault with atrocious intent in addition to possession of dangerous weapons. (see pg. 5a of the appendix.).

On September 26, 1973, during a pre-trial conference before Judge Gagliardi, the respondent-appellant again explained the fact that the defendant Chesimard was preparing for trial in New Jersey on serious counts, showed him the indictment returned against her in the State of New Jersey, and was granted a postponement until the completion of the New Jersey case. In letter dated September 28, 1973, the appellant outlined for Judge Gagliardi the fact that the New Jersey trial would begin on October 9th, 1973 and again requested

a postponement of the trial before the Southern District Court in New York pending the termination of the New Jersey trial (see p. 21a of the index.)

The trial in New Jersey began on the 9th day of October, 1973, because of the inability to choose an impartial jury from Middlesex County, the site of the New Jersey trial, a change of venue was granted on the 1st day of November, 1973 and that case was continued until January 3, 1974, at which time the selection of a foreign jury from Morris County, New Jersey was to begin. Morris County was unacceptable to the defendant Chesimard, however, and various motions were in progress for another change of venue based on computerized, statistical surveys of the racial and other compositional factors relating to the populace of Morris County, New Jersey.

During a pre-trial conference held before Hon. Lee P. Gagliardi, on 11-27-73 all of the above-mentioned facts were presented to him to support appellant's request for an adjournment until the termination of the New Jersey case. In addition to those facts, the respondent-appellant pointed out to the trial judge that the defendant Chesimard had been hospitalized for approximately two months in New Jersey following her arrest; that her attorney, the appellant, was unable to prepare any motions during this time because of the fact that she was permitted to be seen by her attorney for only Ten minutes a day under observation by armed guards who were present in the

hospital room which prevented her as well as jail cell the possibility of client-attorney trial preparation conversations; that it was not until a Court Order was issued in September, 1974 that private consultation was possible, in addition to many other obstacles relating to the imminent trial in New Jersey of the defendant, Chesimard.

Despite a full exposition by the appellant of the compelling reasons for continuing the within prosecution until the termination of the proceedings in New Jersey, the Court refused to do so and, as indicated, scheduled this case for trial on December 3, 1973. (See Transcript November 28, 1973 pp. 1-12A) On or about December 2, 1973, the Court of Appeals for the Second Circuit, refused, in denying a writ of mandamus, to direct the Court to continue said trial, citing United States v. Mitchel, et al., as authority therefor.

(See appendix, pg. 40a)

The trial began on December 3, 1973 with both defendants and their counsel refusing to proceed because of the fact that Ms. Chesimard was unprepared to defend herself adequately because of the New Jersey proceedings. Defendants did not participate in any way in the selection of the jury, openings, cross-examination of prosecution witnesses, presentation of a case for the defense, or summations, maintaining that Ms. Chesimard was being unfairly forced to trial when she was not prepared to do so. Despite failure to participate in the trial on the part of both defendants, the jury was still not able to reach a unanimous verdict, resulting in the aforesaid mistrial.

During the course of the trial, the relationship between the Court, defense counsel and defendants deteriorated to a point where it was obvious that no proper judicial proceeding in the true sense of the word was taking place. Among other things, the following took place:

a. Ms. Chesimard, despite severe bullet wounds which had severed a median nerve on May 2, 1973 during the events that led to her indictment in New Jersey, was forcibly removed from the courtroom on a number of occasions. (MP 44, 64, 72, 79, SLSG 31, 44)

b. The Court told Ms. Williams he would not permit her to protest the abuse of her client "by the United States Marshals, by your Honor or by any other agency in this counrty." (MP 55)

c. Mr. Hilton was also forcibly removed from the courtroom on a number of occasions when he protested the treatment afforded his co-defendant.

d. Ms. Chesimard accused the Court of having made "deals," of being "corrupt" and "bigoted" and "bought and paid for ..." (MP 71), that she was being subjected to a "lynching" (MP 72), that the judge was like "a two-year old baby" (MP 75), that he acted "so unintelligent as to force a lawyer and client to go to trial when they are not prepared" (MP 76), and "you were bought and paid for and you are an agent of them. You have no interest in anything but a railroad" (MP 79), "you need to direct yourself to have some justice" (SLSG 29), "you are a racist" (SLSG 30); and "I know you are an agent, I know you are an agent of the CIA, preserving big business and you have no concern for justice or for black people or for poor people or for any defendant except for Mitchell and Stans" (SLSG 39).

e. The Court threatened to bind and gag both defendants (MP 60) and attempted to force their counsel to make a choice as to whether they desired their client "here in court and gagged or have her removed from the courtroom." (MP 78-83)

f. After removing both defendants from the courtroom on the afternoon of December 4, 1973, the Court denied applications from their attorneys to be excused after refusing to permit them to participate other than in a passive way in the proceedings (MP 84).

g. On that same afternoon, the Court threatened Ms. Williams with contempt if she left the courtroom after the forcible removal of her client despite the fact that he informed her that all that she would be permitted to do in defense thereof was to make objections in the presence of the jury without argument. (MP 86)

h. When Ms. Williams insisted, under these circumstances in leaving the courtroom, the Court announced that he intended "to take the necessary proceedings in connection with your contumacious

conduct to this Court." (MP 87)

i. The Court insisted on appointing Howard Jacobs as alternate counsel for Ms. Chesimard, over the strenuous objections of the latter and Ms. Williams. (SLSG 10)

j. On numerous occasions, the Court accused Ms. Williams of being late for court, although Ms. Williams had, on each and every such occasion, a legitimate excuse for her failure to be present. (Ibid at 4-5) On one such occasion, he indicated that he had considered "the ultimate step ... of directing a marshal to produce counsel here in Court." (Transcript, November 28, 1973, at 7)

k. Ms. Williams was manhandled by United States Marshals during the removal of her client on December 5, 1973. (SLSG 32)

l. On the afternoon of December 5, 1973, when Ms. Williams insisted on refusing to be seated "without the presence of the defendants whose lives, whose liberty is in jeopardy in this case without their presence in this court..." (SLSG 51), the Court, after first ordering her

to be seated (Ibid), finally stated that she could "remain standing if you prefer...." (SLSG 52)

m. When Ms. Williams insisted on reiterating her insistence on representing her client, the Court directed her to return to the counsel table. Upon Ms. Williams insisting that she would not return to the counsel table "unless the defendant Chesimard is here to listen..." (SLSG 53), the following colloquy occurred:

THE COURT: Ms. Williams your failure to obey my instructions may result in your being cited for contempt.

MS. WILLIAMS: I am aware of that.

THE COURT: Do you wish to purge yourself of the possibility of being held in contempt?

MS. WILLIAMS: I will purge myself, your Honor, of nothing except a proper defense of my client.

THE COURT: I will direct you to return to the counsel table.

MS. WILLIAMS: I will do anything, you know, to purge myself of an improper defense of my client.

THE COURT: Will you return to the counsel table?

MS. WILLIAMS: I will not, your Honor, sit at that counsel table in the absence of the defendant.

SUMMARY OF ARGUMENT

The Court's pwoer to punish for contempt stems from 18 U.S.C. 401 and Rule 42 (a) and (b) of the Federal Rules of Criminal Procedure. But, under no circumstances, would a judge who is ''personally embroiled'', Offutt v. United States, 348 U.S. 11, 17)1954), and waits until the end of the trial to proceed, hear and determine contempt charges, Mayberry v. Pennsylvania, 400 U.S. 455 (1971). The United States Court of Appeals for the Second Circuit, in United States v. Marra, 482 F.2d 1196 (1973), in reversing a summary contempt conviction under Rule 42 (a) held that ''the contempt must not only be committed directly under the eye or within the view of the court ... (but must be) an open threat to the orderly procedure of the court ... and a flagrant defiance of the person and presence of the judge before the public ... ''482 F.2d 1202. (This standard has been reaffirmed by the Second Circuit in United States v. Wilson and Bryant, Slip Opinion, 11-28-73), and an issue to be seriously considered by the court as evidenced by the granting of certiorari to the Supreme Court in Taylor v. Hayes, 494 SW2d 737 (1973) in December, 1973; 42 L.W. 3333.

Utilization of the ''summary contempt power is so inconsistent with the requirements of due process that it should no longer be used to maintain order in the court.'' (pg. 3 of the BRIEF AMICUS CURIAE ON BEHALF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK in Taylor

v. Hayes, cited above.) A lawyer cited for contempt faces the possibility of suspension and disbarment. It is urgently incumbent upon the trial court to afford every possible opportunity to the alleged attorney contemnor to receive the benefits of every possible due process constitutional guarantees to eliminate the onus of personal embroilment which is inherent and unconsciously pervasive where the trial judge sits in a greatly publicized case; where the remarks of the defendants are irritants and attack his stature as an impartial judge; and where there is always the question of his ability to maintain the impartiality required of him.

In this case, even if the Court does not find that summary contempt, per se violates the due process clause, the judgment below must be reversed since the record clearly shows that (1) the judge was personally embroiled with the appellant and (2) a proper hearing was not afforded the respondent-appellant.

POINT I.

THE SUMMARY CRIMINAL CONTEMPT POWER VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The basic, alleged purpose of summary contempt is to insure orderly courtroom procedure. This does not, and should not mean, however, that sanctions for alleged courtroom misconduct eliminate due process safeguards and constitutional guarantees.

If it is the court's responsibility to afford due process to all those who come before it, it cannot deny that same due process to those who in any way threaten the order of the courtroom. The basic due process requirements of notice, hearing, an unbiased judge and, where indicated, a jury trial ''cannot be dispensed with because the offense involved is labeled ''contempt of court.''

Justice Black, in his dissent in Green v. United States, 356 U.S. 165, 193-94 (1958) that the essential vice of the summary contempt power is that it enables a judge to combine in one person a variety of functions in a criminal case:

> ''When the responsibilities of lawmaker, prosecutor, judge jury and disciplinarian are thrust upon a judge, he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially on the guilt or innocence of the accused. He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I had always thought to be an indispensable element of due process of law - an objective, scrupulous impartial tribunal to determine whether he is guilty or innocent of the charges filed against him ...'' to this end no man can be a judge in his case and no man is permitted to try cases where he has an interest in the outcome ... Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they profer.'' 356 U.S. at 199.

In Mayberry v. Pennsylvania, 400 U.S. 455 (1971) the Court held that where a judge ''does not act the instant the contempt is committed, but waits until the

end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place ... A judge, vilified ... necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication.'' 400 U.S. at 463, 464, 465.

In the instant case, as reflected by the entire transcript included in the Appendix of the proceedings of November 28, 1973; December 4th and 5th, 1973; there was antagonism openly expressed by the defendants Chesimard and Hilton because, in their opinion, the Court's refusal to permit Defendant Chesimard time within which to prepare her defense deprived her of the ability for any defense whatsoever. There was acrimony; bitter exchanges between both defendants and the court; a frustrating situation as related to both trial attorneys for the defendants and, clearly, in this atmosphere, impossible for the trial Judge to evaluate with any degree of judicial detachment, the proceedings which ensued thereafter.

The trial judge's own contempt citation, as well as his memorandum of decision attached to his judgment and sentence of committment of the appellant manifests his inability to maintain the objectivity expected and required. The judge's comments throughout the entire

trial, as reflected on the days previously mentioned, show that he felt personally affronted by what occurred in his courtroom.

It is further contended that Offutt v. United States, 348 U.S. 11 (1954) applies here. In Offutt the Court held that a trial judge who becomes "personally embroiled" with an alleged contemnor cannot hold him in contempt even though the sentence was only ten days. In re McConnell, 370 U.S. 29 (1963), the Court held that no contempt may be punished unless there is an actual obstruction of justice.

Under United States v. Meyer, 462 F.2d 827 (D.C. Cir. 1972); Weiss v. Furr, 484 F.2d 973 (9th Cir. 1973); in Re Dellinger, 461 F.2d 389 (7th Cir. 1972) it has been held that the Mayberry rule applies to lawyers as well as to defendants who are charged with contempt and that, further, the trial judge cannot wait until the end of the trial to sentence for contempt and further emphasizes Justice Black's statement in Green that "trial judges should never be trial judges of the charges they prefer".

POINT II

THE TRIAL JUDGE BELOW WAS REQUIRED TO REFER THE CONTEMPT PROCEEDINGS TO ANOTHER JUDGE FOR A FULL DUE PROCESS HEARING

A proper hearing was not afforded the respondent-appellant. As indicated by the record and the transcript

appellant was cited for contempt, summarily, on the 5th day of December, 1973. On the 18th day of December, at the termination of the trial, she was served with with contempt citation. On the day of sentence, the only opportunity afforded her for any scintilla of due process was a verbal presentation of the motion presented to the court by her attorney, and a statement made by the appellant in mitigation. The Court in United States v. Wilson and Bryan ---Fsd---, (2d Cir. November, 1973) held that the right of allocution is not enough in a contempt case. That, further, there must be more meaningful opportunity to be heard in mitigation of the offense. The Court stated, ''Nor is the bare ''opportunity to be heard'' dispositive here since the ''hearing was confined to the matter of sentence.''

CONCLUSION

FOR THE FOREGOING REASONS, IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT BELOW SHOULD BE REVERSED

Respectfully submitted,

JAMES LARSON
ARTHUR KINOY
National Lawyers Guild
23 Cornelia Street
New York, N.Y. 10014

O.T. WELLS
National Bar Asson.
377 Broadway
New York City, N.Y.

Dated: New York, N.Y.
April 15, 1974

Evelyn Williams (pro se)
461 Central Park West
New York City, N.Y. 10025

WILLIAM M. KUNSTLER
Center for Constitutional Rights
853 Broadway
New York City, N.Y. 10003

HAYWARD BURNS
National Conference of Black Lawyers
126 West 119th Street
New York City, N.Y. 10026

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 15 day of April, 19 74 at No. N.S. Courthouse, 57 C. deponent served the within Brief upon M. L. Adams the Appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 14 day of April 1974

Edward Bailey

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975